No. 98-436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as the present state employee action against the State of Maine under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* —on the basis of state sovereign immunity?

2. If a state court may properly refuse to entertain such a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?

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BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, in FLSA § 3(d) and (x), 29 U.S.C. § 203(d) and (x), expressly includes the States as "employers" subject to the obligation imposed by § 7, 29 U.S.C. § 207, to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold. And, FLSA § 16(b) authorizes employee suits in the state courts and the federal courts to recover "unpaid overtime compensation" and "an additional equal amount as liquidated damages," 29 U.S.C. § 216(b).

In December, 1992, a group of Maine probation officers filed an FLSA suit against the State of Maine in the United States District Court for the District of Maine seeking overtime compensation and liquidated damages. In a bifurcated proceding, the District Court sustained the probation officers' claim in part, holding that they were "law enforcement" employees, FLSA § 13(b)(20), 29 U.S.C. § 213(b)(20), entitled to overtime pay under the special provisions that apply to such employees, § 7(k), 29 U.S.C. § 207(k), and not, as Maine had contended, "professional" employees exempt from statutory coverage, § 13(a)(1), 29 U.S.C. § 213(a)(1). *See Mills v. Maine*, 839 F. Supp. 551, 552 (D. Me. 1994); 839 F. Supp. 3 (D. Me. 1993).

While the probation officers' federal court action was pending, and before the District Court finally determined the State's precise back pay obligation, this Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). On the strength of that decision, the District Court dismissed the probation officers' federal court action on Eleventh Amendment grounds, and that ruling was affirmed on appeal. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

In August, 1996, just after the District Court's Eleventh Amendment ruling, the probation officers filed this action against the State of Maine in the Superior Court of Cumberland County, Maine, again alleging that the State had violated the FLSA overtime provisions. The Superior Court dismissed the claim as barred by state sovereign immunity despite the probation officers' argument that the "FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts." Pet. App. 22a.[1]

The probation officers filed a timely appeal, raising two main points grounded in the Supremacy Clause.[2] *First*, state courts must enforce valid federal laws, such as the FLSA, notwithstanding any claim of state sovereign immunity. *Second*, Maine cannot close its courts, on sovereign immunity grounds, to private actions against the State for monetary relief based on a claim under federal law when its courts are open to private actions against the State based on analogous claims under state law.

The Maine Supreme Judicial Court by a 4-2 panel vote affirmed the Superior Court. That court read *Seminole Tribe* to confirm the view—expressed in earlier Maine Supreme Judicial Court decisions[3]—that the Eleventh Amendment embodies state sovereign immunity as a "background principle" of the federal Constitution that applies beyond the federal courts to bar federal claims advanced in state court where those claims would be barred if brought in federal court. Pet. App. 6a. And,

[1] The State also argued that the probation officers' claim was barred by the statute of limitations. The Superior Court rejected that argument, and the State did not appeal that ruling to the Maine Supreme Judicial Court.

[2] Appellants' Br. at 9-29; Appellants' Reply Br. generally. J.A. 68-86; 151-63.

[3] *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 280 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); and *Moody v. Commissioner*, 661 A.2d 156 (Me. 1995).

the Maine Court rejected the probation officers' contention that Maine discriminated against federal causes of action; that court reasoned that no Maine statute authorized the *precise* state employee statutory cause of action the probation officers had stated in their FLSA complaint. Pet. App. 6a-7a.

SUMMARY OF ARGUMENT

I. Among the Article I powers granted to Congress by the Constitution is the power to subject all persons and entities, public and private, to certain rights and obligations with respect to the nature of their activities affecting interstate commerce, and to provide for the enforcement of those rights and obligations through the usual processes of the law. In the case of the Fair Labor Standards Act —the statute at issue here—Congress has chosen to require that certain employees of public and private employers be compensated at a certain rate for overtime work and explicitly to authorize such employees to enforce their rights through the bringing of private actions in the federal and state courts.

After Congress had so acted, this Court in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), held that, because of the Eleventh Amendment, there is no Article III jurisdiction in the federal courts over private party actions against a State or state agency including FLSA overtime pay actions.

But, as this Court reaffirmed in its unanimous opinion in *Howlett v. Rose*, 496 U.S. 356 (1990), federal law is enforceable in state court and the state courts have a corresponding duty to enforce federal law as the "supreme Law of the land." *Howlett* goes on to demonstrate that state sovereign immunity rules—no more than other state rules affecting the conduct of litigation in state courts—cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action and the interposition of state law would

frustrate the federal goal of providing for effective enforcement.

And, nothing in this Court's Eleventh Amendment jurisprudence, as reflected in a line of decisions culminating in *Seminole Tribe*, is inconsistent with this important principle. The Eleventh Amendment establishes a limit on the jurisdiction of the federal courts to hear and decide actions against an unconsenting State or state agency and, by reason of the separation of powers principle, on Congress' power to provide for any such head of federal court jurisdiction. Unlike private persons (or state subdivisions), a State or state agency may always opt to be sued *not* in the federal judicial system but in the more familiar setting of its own judicial system.

Apart from the Article III/Eleventh Amendment state sovereign immunity rule that limits federal court jurisdiction, there is no constitutional state sovereign immunity barrier to Congress' power to provide for the enforcement against the States of a constitutionally proper enactment, including enforcement through private party suits against a State in a state court. That is demonstrated by a range of decisions in this Court, including *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (relating to the enforcement of a federal right in a state court) and *Nevada v. Hall*, 440 U.S. 410 (1978) (relating to a suit against a State in the courts of another State). Moreover, other decisions of this Court, including *Reich v. Collins*, 513 U.S. 106 (1994), indicate that the failure of a State to afford redress when required in order to remedy a federal wrong would raise the most serious questions under the Due Process Clause of the Fourteenth Amendment.

II. Even assuming that there are circumstances in which a state court may refuse to entertain an action brought to enforce a federal right by application of a rule that treats all litigants in similar fashion—an assumption that does not hold in any event when, as here, the state rule operates to frustrate an overriding federal purpose—it is well established that a State may not choose to discriminate

among litigants on the basis that federal law furnishes their underlying right. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947); *Howlett v. Rose, supra.*

In the present case, the State of Maine has done exactly that. At the very time when the Maine courts choose to honor the defense of sovereign immuunity to a claim for wages owing under federal law, the state courts consistently allow state employees to bring state statutory law actions against their employers for damages, including wages owed. While the Maine Supreme Judicial Court sought to evade this discrimination by noting that state law as a substantive matter does not provide for actions of the precise type authorized by the FLSA, an analysis of the state law shows beyond any doubt, that the state employee actions that the state courts do hear and decide are so closely analogous as to be functionally indistinguishable from the action brought here. And as *Testa v. Katt* makes clear, unconstitutional discrimination is shown when the state courts entertain state law actions "of the same type" as those sought to be pursued under federal law.

ARGUMENT

I. A State Court May Not Refuse To Entertain A Federal Statutory Private Party Cause Of Action Against A State—Such As The Present State Employee Action Against The State Of Maine Under The Overtime Provisions Of The Fair Labor Standards Act—On The Basis Of State Sovereign Immunity.

Article I of the Constitution of the United States grants the Congress a set of enumerated plenary legislative powers. These include the Article I, § 8 power to enact federal laws of general application, such as the Fair Labor Standards Act, regulating aspects of the economic life of the Nation. As this Court has held, this commerce clause power authorizes Congress to extend such economic regulations to the States *qua* employers and as part of the class of employers whose hiring and compensation decisions affect interstate commerce. And, by the force of Article VI, such laws are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Congress, likewise, has the Article I power, as a general matter, to make the rights declared in federal enactments enforceable by private party right-holders in the state courts of general jurisdiction. And, when Congress exercises that legislative power, the constitutional plan dictates that the state courts, again as a general matter, have a concomitant obligation, made manifest in the Supremacy Clause, to entertain, and to adjudicate, such federal-rights suits, and to do so in conformity with federal law, including federal law that preempts conflicting state law.

When Congress exercises its Article I power to make the rights declared in an economic regulation of general application, such as the FLSA, enforceable against a State by a private-party right-holder in state court the question then arises—and it is the question here—whether that exercise of power is barred by the state sovereign immunity doctrine.

By reason of Congress' restraint in enacting economic regulations that bear directly on the States, and of the preference of suitors for vindicating federal statutory rights in the federal courts, this Article I/state sovereign immunity question is, so far as our researches show, a question that this Court has not yet directly addressed.

But precedent and first constitutional principles offer substantial guidance, and in light of both, it is our submission that the Constitution vouchsafes to Congress the Article I power exercised here and that this federal sovereign authority is not defeated by state sovereign immunity.

In making that submission, we begin with the federal statute at issue here, the FLSA, and trace its evolution to the 1966 and 1974 amendments extending its norms to the States and providing in clear, explicit terms for state employee wage suits against the States in state court.

We then turn to this Court's decisions in *Garcia v. San Antonio Metro. Transit Auth. (SAMTA)*, 469 U.S. 528 (1985), and in *Howlett v. Rose*, 496 U.S. 356 (1990), to establish the essential predicates of our position:

- First, as to *Garcia*, that Congress in extending the FLSA to the States acted within its constitutional authority and in a manner consistent with the state sovereignty constraints on its law-making powers;
- And second, as to *Howlett*, that Congress, as a general matter, has the authority to make FLSA rights enforceable in the state courts of general jurisdiction and that those courts have an obligation to hear, and decide, such federal rights causes of action—an obligation that preempts state rules that would frustrate the effectuation of federal purposes.

Finally we demonstrate that *Howlett*'s preemption analysis governs where a federal law actionable in state court provides for state liability and the State would preclude liability by invoking state sovereign immunity. In so doing we show that Congress' authority to provide for such suits to enforce a right stated in an otherwise constitutional

federal law is not circumscribed by any state sovereign immunity rule established by the Constitution itself.

A

In a number of contexts this Court has insisted that where Congress acts in "traditionally sensitive areas, such as [by enacting] legislation affecting the federal balance, and in so doing intends to pre-empt the historic powers of the States," or to otherwise "alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotations and citations omitted).

The evolution of the FLSA, in response to changing economic conditions—and most particularly to the growth of public employment—as well as to this Court's rulings over the last quarter century, confirms that Congress unmistakably intended to authorize public employees, including state employees, to bring wage suits against public employers, including state employers, to redress violations of their FLSA rights.

1. The FLSA, as originally enacted in 1938, applied only to private sector employers and employees and not to the public sector—federal, state or local. *See* 29 U.S.C. § 203(d) (1940) (excluding States and their political subdivisions from the definition of "employer"). "The central aim of the Act was to achieve, in those industries within its scope, certain minimum labor standards." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). To that end, the FLSA sought to "raise substandard wages first by a minimum wage and then by increased pay for overtime work," and thereby "to have an appreciable effect in the distribution of available work." *Overnight Motor Co. v. Missel*, 316 U.S. 572, 577, 578 (1942).

In 1966, Congress expanded FLSA coverage, including for the first time, certain federal, state and local public sector employers and employees. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 831,

29 U.S.C. §§ 203(a), 203(r)(1), 203(s)(4), 218 (1970). In extending coverage to "some 7.2 million workers, many of whom are among the lowest paid workers in the country," Congress recognized that "long working hours and wages which barely provide subsistence are still a daily way of life for far too many of our citizens." S. Rep. No. 1487, 89th Cong., 2d Sess. at 2 (1966).

Federal and state employees made up slightly less than 20% of the employees covered by the FLSA through the 1966 amendments. *Id.* at 2, 6 (chart). The state employees newly covered were chiefly those employed by state operated hospitals and schools, including state institutions of higher education. (These amendments also broadened the coverage of private sector hospitals and schools.) These state facilities were included among the "enterprises" defined as engaged in commerce or production for commerce, and in the corresponding definition of "employer." Congress did not, however, amend FLSA § 16(b), which provided simply that employee wage actions "may be maintained in any court of competent jurisdiction."

2. In *Employees v. Missouri Public Health Department*, 411 U.S. 279, 285 (1973), this Court held that since Congress had not amended FLSA § 16(b) to provide expressly for federal court state employee wage suits against a State, the States retained their Eleventh Amendment immunity to such actions in federal court.[4] The Court added that the amendments were not thereby rendered "meaningless" since FLSA § 16(c) authorized the Secretary of Labor to bring wage suits on the employees' behalf in federal court and since § 16(b) "arguably . . . permits [employee] suits in the Missouri courts." *Id.* at 285-287.[5] Indeed, Justice Marshall's concurring opinion, joined by Justice Stewart, read § 16(b) as plainly and

[4] The Court noted also that it "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." 411 U.S. at 285.

[5] The Court noted that the question of state amenability to suit in state court was "a question we need not reach. We are con-

properly authorizing state employee wage suits in *state* courts:

> [Through the 1966 amendments], Congress created in these [state] employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. *See Testa v. Katt,* 330 U.S. 386 (1947). See also *General Oil Co. v. Crain,* 209 U.S. 211 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat, 304, 339-340 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see *Testa v. Katt, supra,* at 392-394; *Second Employers Liability Cases* [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1, 57-58 (1912). [411 U.S. at 297-298.]

3. In 1974, Congress again amended the FLSA, both to broaden its coverage of private sector employers and employees and of federal, state and local public sector employers and employees, and to make plain its intention to provide for public employee wage suits against public employers. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58, 29 U.S.C. §§ 203(d), 203(r)(3), 203(s)(5), 203(x), 216(b). Congress estimated that the amendments extended coverage to about 5,000,000 federal, state and local government employees, including all otherwise non-exempt (non-professional, executive or administrative) employees "in all civilian branches of the Federal Government." H.R. Rep. No. 93-913, 93d Cong., 2d Sess. at 26 (1974).

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cerned only with the problem of this Act and the constitutional constraints on the 'judicial power' of the United States." *Id.* at 287.

Through these amendments Congress sought "to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable and to raise the minimum wage to a level which will prevent the disgraceful and intolerable situation of workers and their families dwelling in poverty." H.R. Rep. No. 93-913, at 8.

To that end, Congress amended, *inter alia,* FLSA § 3(d) to include "public agenc[ies]" among the employer entities defined as "employers", § 3(e) to include "employees of public agencies" among the employees covered by the Act, subject to certain exceptions, and added a new § 3(x) to define "public agency" to include, along with other public employers, "the Government of the United States; [and] the government of a State or political subdivision thereof." 29 U.S.C. §§ 203(d), 203(e), 203(x). In recognition of the unique character of public law enforcement and public fire prevention, Congress also added a new § 7(k), which provided an alternative, and more flexible statutory basis for determining when police officers and fire prevention personnel are entitled to overtime compensation. 29 U.S.C. § 207(k).

In addition, Congress amended FLSA § 16(b) to provide that an "action to recover [an FLSA wage] liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). As House Report No. 93-913 states, "Section 16(b) of the Act is amended to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction" and in that way to meet the "clear statement" of intent requirement of the *Missouri Employees* decision. *Id.* at 42.

4. The 1974 FLSA amendments, insofar as they extended the Act to the States and their subdivisions, gen-

erated a substantial constitutional question with respect to Congress' commerce clause power to extend economic regulations of general application, such as the FLSA, to state employers. That question was resolved in this Court's *Garcia v. San Antonio Metro. Transit Auth. (SAMTA)* decision. *See* pp. 12-13, *infra*.

In the wake of *Garcia*, Congress enacted Fair Labor Standard Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 878. The 1985 amendments, without "retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments," sought to "fairly accommodate[]" the "particular needs and circumstances of the States and their Political subdivisions." S. Rep. No. 99-159, 99th Cong., 1st Sess. at 7 (1985). In particular, the 1985 amendments provide public sector employers with the option, under specified circumstances, of compensating employees for overtime through compensatory time-off rather than added compensation—an option that is not available to private sector employees.

In sum, the statutory text, its legislative history, and its evolution demonstrate that the Congress, after prolonged and mature deliberation, reached the considered judgment—stated in clear, express terms—to extend the FLSA's norms to the Federal Government and to the States and their subdivisions as employers—with ameliorating adjustments to those norms to take account of their governmental status—*and*, as a means of enforcing those norms, to provide for public employee wage suits against public employers.

B

Garcia v. San Antonio Metro. Transit Auth. (SAMTA), *supra*, upholds the constitutionality of the extension of the FLSA minimum wage and overtime requirements to the States and state subdivisions. In so doing, the Court emphasized that a covered public employer, like SAMTA, "faces nothing more than the same minimum wage and overtime obligations that hundreds of thousands of other

employers, public as well as private, have to meet." 469 U.S. at 554. And, in reaching its conclusion, the *Garcia* Court was guided by two aspects of the constitutional plan that set the framework for considering the question presented here.

First, "the sovereignty of the States is limited by the Constitution itself"—most notably by Article I, § 8, which works a "sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." 469 U.S. at 548. Thus, while "States unquestionably do 'retai[n] a significant measure of sovereign authority,' . . . [t]hey do so . . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." 469 U.S. at 549 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (Powell, J., dissenting)).

Second, except for provisions "like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. . . . [T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies." 469 U.S. at 550.

C

This Court's precedents establish as well that Congress acts within its constitutionally enumerated powers and in accord with the constitutional plan in providing for the enforcement of federal statutory rights in the state courts as well as in the federal courts.

There can be no dispute as to Congress' basic commerce clause power to provide for the enforcement of a federal enactment by authorizing a damage action by a person

injured by violation of the statutory norms. As Justice Holmes put the point in an early Sherman Act case: "There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. . . . In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage . . . ." *Chattanooga Faculty & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396-97 (1906) (citations omitted).

There likewise can be no dispute as to the constitutional plan regarding the role of the state courts where Congress has provided for private party federal statutory actions in those courts. This Court's unanimous opinion in *Howlett v. Rose*, *supra*, states the governing principle:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876) . . . . [496 U.S. at 367 (citations omitted).]

As the Court added in *Printz v. United States*, 117 S. Ct. 2365 (1997)—in distinguishing the role of the state courts from that of the state executive and the state legislature in enforcing federal law—this understanding that the Constitution "permit[s] imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions relate[] to matters appropriate for the judicial power" was "perhaps implicit" in Article III and was "explicit" in the Supremacy Clause:

> In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. . . . And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns at the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. . . . The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. [117 S. Ct. at 2371 (emphasis in original) (citations omitted).][6]

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[6] *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2037 (1997) (opinion of Kennedy, J.) ("Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret, and to follow the Constitution and all laws enacted pursuant to it . . . . The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation . . . . The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law 'together form one system of jurisprudence.' *Claflin v. Houseman*, 98 U.S. 130, 137 (1876).").

The overarching principle stated in *Howlett* does not, of course, exhaust the complexity of the matter or expose the nuances of state court enforcement of federal law. *Howlett* summarizes the law as it stands in those regards as "[t]hree corollaries [that] follow from the proposition that 'federal' law is part of the 'Law of the Land' in the State"—corollaries that are "fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." 496 U.S. at 369, 372-73. The first is that

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387-388 (1929) (Holmes, J.). "The existence of the jurisdiction creates an implication of duty to exercise it." *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912) . . . . [496 U.S. at 369 (citations omitted).]

The second corollary follows from the first and states the basic limit on the "valid excuse" concept:

> An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou*, 223 U.S., at 57 . . . . [496 U.S. at 371 (citations omitted).]

And, the third corollary sets out the "neutral state rule of administration" precept:

> When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. . . . The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, [The Relations Between State and Federal Law,] 54 Colum. L. Rev. [489,] 508 [(1954)] . . . . The States thus have great latitude to establish the structure and jurisdiction of their own courts. . . . In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. [496 U.S. at 372 (citations omitted).]

Howlett then goes on to elaborate on the second and third of these corollaries and on their interrelation by focusing on the force and effect of federal law liability rules on state law immunities where a federal statutory rights suit is brought in state court. In so doing *Howlett* begins from the settled proposition that the "elements of, and the defenses to, a federal cause of action are defined by federal law." 496 U.S. at 375. That being so,

> "Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Owen v. City of Independence*, 445 U.S. [622], 647, n.30 [(1980)]. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever

vestige of the State's sovereign immunity the municipality possessed." *Id.*, at 647-648 (footnote omitted). [496 U.S. at 376.]

At that juncture *Howlett* traces the Court's application of the rule stated in *Owen* first in *Martinez v. California*, 444 U.S. 277 (1980), and then in *Felder v. Casey*, 487 U.S. 131 (1988). *Howlett* notes that in *Martinez* the Court

> unanimously concluded that a California statute that purported to immunize public entities and public employees from any liability for parole release decisions was pre-empted by § 1983 "even though the federal cause of action [was] being asserted in the state courts." *Id.*, at 284. We explained:
>
> > " 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law.' *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973), cert. denied, 415 U.S. 917." Id., at 284, n.8. [496 U.S. at 376-77.]

And, *Howlett* adds that in *Felder v. Casey* the Court

> followed *Martinez* and held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions. . . . We concluded: "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the

> State has no authority to override." *Id.*, at 143. [496 U.S. at 377.][7]

Against this background, the *Howlett* Court ruled:

> Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations. . . . Florida law, as interpreted by the District Court of Appeal, would make all such defendants absolutely immune from liability under the federal statute. To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). [496 U.S. at 377-78.]

Howlett, then, recognizes that after the adoption of the Constitution, as before, each State and its subdivisions possess state sovereign immunity to the extent established by the State's common law, its constitutional law or its statutory law. *Howlett* recognizes as well that nothing in the Constitution affects those rules of state sovereign immunity where the cause of action is a non-federal cause of action. At the same time, *Howlett* holds that by reason of the Supremacy Clause, when Congress makes a federal law enforceable in the state courts and provides therein for state subdivision liability, the federal law preempts any conflicting state rule of state sovereign immunity.[8]

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[7] Other decisions, like *Felder v. Casey*, support *Howlett*'s recognition that when state litigation rules conflict with the effectuation of a valid federal purpose, the state rules must yield. *See, e.g., Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359 (1952); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

[8] We note that after taking its preemption analysis of the municipality's state soverign immunity claim to the conclusion outlined

Howlett and the instant case, of course, do not arise in identical legal contexts. The federal enactment at issue

above, the *Howlett* Court considered and rejected the alternative arguments (i) that state sovereign immunity law is the "kind of neutral policy that could be a 'valid excuse' for the state court's refusal to entertain federal actions," 496 U.S. at 379; and (ii) that federal law cannot "compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of [the] state law [of sovereign immunity]," *id.* at 381.

In this case, the State of Maine has not invoked either the "valid excuse" rule or any "absence of state court jurisdiction" rule. We therefore relegate these portions of *Howlett's* rationale to the summary that follows. As to "valid excuse" *Howlett* states:

> To the extent that the Florida rule is based upon the judgment that parties who are otherwise subject to the jurisdiction of the court should not be held liable for activity that would not subject them to liability under state law, we understand that to be only another way of saying that the court disagrees with the content of federal law. There is no question that the Circuit Court, which entertains state common-law and statutory claims against state entities in a variety of their capacities . . . has jurisdiction over the subject of this suit. That court cannot reject petitioner's § 1983 claim because it has chosen, for substantive policy reasons, not to adjudicate other claims which might also render the school board liable. The federal law is law in the State as much as laws passed by the state legislature. A "state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" *Testa* [*v. Katt*], 330 U.S. [386,] 393 [(1947)] (quoting *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. [211], 222 [(1916)]. [496 U.S. at 379-80.]

As to state court "jurisdiction" over federal statutory causes of action, *Howlett* adds:

> The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect. It is settled that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to

in *Howlett* was a civil rights act (42 U.S.C. § 1983), based in part on the Fourteenth Amendment, and § 1983 covers, and provides a liability rule applicable to, state subdivisions but not the States themselves. The federal enactment here, in contrast, is an Article I, § 8 commerce clause economic regulation that, *inter alia*, covers, and provides a liability rule applicable to, both state subdivisions and the States themselves. And, of course, for Article III/Eleventh Amendment state sovereign immunity doctrine purposes these are distinctions that make a legal difference. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65-66 (1996) (discussing the Fourteenth Amendment/Article I distinction) and *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 680-81 (1978) (discussing the State/state subdivision distinction).

But, as we have seen, nothing in *Howlett*'s analysis of the force and effect of the federal liability rule there at issue on the state sovereign immunity rule invoked by the state subdivision turned on the Fourteenth Amendment nature of the federal enactment or the particular place of state subdivisons in the federal hierarchy. To the contrary, *Howlett* is based on fundamental Supremacy Clause principles that in their terms apply equally to the force and effect of Article I enactments and to the force and effect of Fourteenth Amendment enactments on the States and on state subdivisions.

It is thus our submission that the fundamental Supremacy Clause principles stated in *Howlett* and applied there govern here as well. And, retracing the *Howlett* analysis and applying it here shows that in enacting a

> entertain another State's cause of action by invocation of the term "jurisdiction." . . . Similarly, a State may not evade the strictures of the Privileges and Immunities Clause by denying jurisdiction to a court otherwise competent. . . . [T]he same is true with respect to a state court's obligations under the Supremacy Clause. The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction." [496 U.S. at 38-83 (citations and footnotes omitted).]

constitutionally proper economic regulation applicable to the States and in providing a state employee federal cause of action against the State for a State violation of the statutory norms, Congress has "most assuredly determined that the States shall be subject to liability for violations of that federal law." That being so, a State's defenses to this federal rights cause of action that are akin to the municipality's defense in *Howlett*—including an assertion of state sovereign immunity—"are controlled by federal law." And, of course, Congress is as much "the supreme sovereign on matters of federal law" affecting the States as on matters of federal law affecting state subdivisions.

It follows that a determination by Congress to make a State liable for a violation of a federal statute under a federal cause of action brought in state court preempts the State's law that immunizes the State from any such liability. "To the extent that the [state] law of sovereign immunity reflects a substantive disagreement with the extent to which government entities should be held liable for their [federal statutory] violation, that disagreement cannot override the dictates of federal law."

D

To be explicit on an obvious—but critical—point, our reliance on *Howlett* and its predecessors—and on the Supremacy Clause in establishing the priority of federal law liability rules over state sovereign immunity rules—rests on the premise that the state sovereign immunity invoked by the State in this case, like the state sovereign immunity invoked by the municipality in *Howlett*, is an immunity provided by the laws of the State, *not* an immunity provided by the Constitution itself and secured thereby against preemption by a federal statutory liability rule. That premise rests on the Constitution and on the decisions of this Court interpreting the Constitution.

At the threshold, it is plain that nothing in the constitutional text purports to afford the States a state sovereign immunity that places an absolute general limit on Congress' enumerated legislative powers. Nor can the Constitution be said to provide for any such limit by fair implication. Rather, under the constitutional scheme Congress is sovereign in exercising its enumerated powers —including its power to extend to the States the norms stated in economic regulations of general application. Those grants of legislative power necessarily limit the sovereignty of the States. In the absence of a clear counter indication, it follows ineluctably that Congress' sovereign legislative power, by its nature, includes the power to make its laws enforceable by providing for state liability for state violations and by negating any state immunity rooted in the common law of any particular State, or in its state statutory law, or in its state constitutional law.

In so stating we do not seek to reopen, or to reargue, the issues recanvassed most recently in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For *Seminole Tribe*'s rationale and holding strengthen—albeit by negative implication—our position here that there is *no* constitutional principle of state sovereign immunity that works any absolute general limitation on Congress' Article I powers.

Seminole Tribe reestablishes that "the Eleventh Amendment [stands] for the constitutional principle that sovereign immunity limit[s] the *federal courts*' jurisdiction under Article III." 517 U.S. at 64 (emphasis added). In this regard the Court noted:

> The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit . . . ." And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of *judicial authority in Art. III*," *Pennhurst State School and Hospital v. Halder-*

> *man*, 465 U.S. 89, 97-98 (1984); see [*Pennsylvania v.*] *Union Gas* [*Co.*, 491 U.S. 1] 38 [(1989)] (" '[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . .' ") (SCALIA, J., dissenting) (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)) . . . . [517 U.S. at 64-65 (emphasis added) (citation omitted).]

Seminole Tribe then goes on to

> reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.* [517 U.S. at 72-73 (emphasis added; footnote omitted).]

In the course of its discussion of Article III jurisdiction, the Court made special mention of "the [recorded] views of Marshall, Madison and Hamilton . . . [t]he most natural reading of which would preclude all *federal jurisdiction* over an unconsenting State." 517 U.S. at 70 (emphasis added). These views—in common with the other portions of the record on the adoption of the Constitution and the adoption of the Eleventh Amendment that speak to state sovereign immunity cited in *Seminole Tribe*—provide no support for the thesis that there is an absolute general constitutional state sovereign immunity limit on Congress' Article I powers.[9] The proponents of the state

[9] During the Virginia debate on the ratification of the Constitution both Madison and Marshall directed their remarks to the

sovereign immunity limitation on the jurisdiction of the federal courts stated their case in terms of the need to place a limitation on Article III to negate the power of those courts to hear and decide common law causes of action against the States—most particularly those concerning the States' unpaid Revolutionary War debts. So far as we are aware, none of the proponents argued for any limit on Article I that would provide a constitutional guarantee immunizing the States from all private party suits based on, and authorized in, federal statutes.

As all the foregoing makes clear, the *only* state sovereign immunity principle recognized in *Seminole Tribe* is an immunity principle incorporated into *Article III as clarified by the Eleventh Amendment* to effectuate a limitation on the enumerated heads of the *federal courts'* Article III jurisdiction. *Seminole Tribe* does not stand for the proposition that there is any more far-reaching constitutional principle of state sovereign immunity that limits Congress' Article I powers to enact federal rights and provide for the enforcement of those rights.

Article III jurisdiction of the federal courts. Thus Madison began by stating that "[the Article III] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason," and then argued for the proposition that Article III means only that "if a state should wish to bring a suit against a citizen, it must be brought before the federal courts." 3 The Debates in the Several State Conventions of the Adoption of the Federal Constitution 530 (J. Elliot ed. 1866). Marshall, in supporting Madison's thesis, began "with respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual behemence" and then argued that "I hope that no gentlemen will think that a state will be called at the bar of the federal court." *Id.* at 555-556 (emphasis in original). Finally, in the Federalist No. 81, Hamilton directed his remarks to rebutting the "suggest[ion] that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation."

Seminole Tribe, rather, invokes the rule that "Article III . . . set[s] forth the exclusive catalog of permissible federal-court jurisdiction" and that, as a matter of the separation of powers, Congress cannot "under Article I expand the scope of the federal courts' jurisdiction under Article III."

That most emphatically is not a rule stripping Congress of its Article I power to provide for private party federal statutory actions against the States in state court. On the contrary, the essence of the Eleventh Amendment, and of the cases construing it, is that by imposing a limitation on the judicial authority of the federal courts, the Constitution gives to each State a choice of forum that no private party possesses—the choice (regardless of the plaintiff's preference) of defending a claim of federal right made against the State not in the federal judicial system but in the familiar setting of its own judicial system.

That Article III/Eleventh Amendment state sovereign immunity goes no further is confirmed not only by the reasoning of—and sources relied upon in—*Seminole Tribe*, but equally by a long line of cases in which the Court has "stated on many occasions, [that] 'the Eleventh Amendment does not apply in state courts,' *Will*, 491 U.S. at 63-64, citing *Maine v. Thiboutot*, 448 U.S. 1, 9, n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979)." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 204-205 (1991).[10]

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[10] See also *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-240 n.1 (1985), where the Court responded to the claim that "in the absence of jurisdiction in the federal courts, the States are 'exemp[t] . . . from compliance with laws that bind every other legal actor in our Nation' " as follows:

> This claim wholly misconceives our federal system. As JUSTICE MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals*." *Employees v. Missouri Dept. of Public Health and Welfare*, *supra*, [411 U.S. 279] at 293-294 (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816). See also *Stone v. Powell*, 428 U.S. 465, 493, n.35 (1976), and post, at 256, n.8.

Of the precedents cited in *Hilton*, *Nevada v. Hall* is of particular significance. That case concerned "a tort action [filed in the California courts by California residents, and naming the State of Nevada as a defendant] arising out of an automobile collision in California" between an automobile driven by the plaintiffs and an automobile driven by "an employee of the University of Nevada, . . . and owned by the State, [who] was engaged in official business [on behalf of] the University [which] is an instrumentality of the State itself." 440 U.S. at 411-412.

In this Court, Nevada argued "that California is not free, as a sovereign, to apply its own law, but is bound instead by a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418. This Court concluded that there is *no* such "federal rule of law implicit in the Constitution." In so doing, the Court stated in relevant part:

> Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign.
>
> * * *

The debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III. In the Federalist, Hamilton took the position that this authorization did not extend to suits brought by an individual against a nonconsenting State. The contrary position was also advocated and actually prevailed in this Court's decision in *Chisholm v. Georgia*, 2 Dall. 419.

The *Chisholm* decision led to the prompt adoption of the Eleventh Amendment. That Amendment places explicit limits on the powers of federal courts to entertain suits against a State.

The language used by the Court in cases construing these limits, like the language used during the debates on ratification of the Constitution, emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. These decisions do not answer the question whether the Constitution places any limit on the exercise of one's State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case. [440 U.S. at 418-21 (footnotes omitted).]

Nevada v. Hall thus provides the strongest support for our position here. In the end, the State of Maine can prevail in this case only if the Constitution itself places an absolute general state sovereign immunity limit on Congress' Article I law making powers, just as the State of Nevada could prevail only if the Constitution itself "requires all of

the States to adhere to the sovereign immunity doctrine as it prevailed when the Constitution was adopted," 440 U.S. at 418.

Nevada v. Hall holds that nothing in the constitutional debates on state sovereign immunity, nothing in the Constitution's language and structure, and nothing in this Court's state sovereign immunity decisions "provide any basis, explicit or implicit" for imposing a constitutional state sovereign immunity "limit" on the judicial "powers of California" to hear and decide a case against the State of Nevada "exercised in [that] case." 440 U.S. at 421. It is equally true that nothing in these constitutional materals provides any basis, explicit or implicit, for imposing a constitutional state sovereign immunity limit on the Article I powers of Congress exercised here.

There is a second, and discrete, line of cases which is relevant here as well—the line in which this Court has made it clear that when the federal right sought to be vindicated by a state court action against a state entity or officer is the right against the exaction of state taxes in violation of the laws or Constitution of the United States, the State may not interpose state sovereign immunity as a bar, even assuming that the defense would be available were the state court action brought to vindicate a state law right. *See Reich v. Collins*, 513 U.S. 106 (1994); *Ward v. Board of Comm'rs of Love Cty.*, 253 U.S. 17 (1920); *General Oil Co. v. Crain*, 209 U.S. 211 (1908).[11] As the Court stated in *Reich v. Collins*:

> [In the Georgia Supreme Court, Reich contended that] even if the Georgia tax refund statute does not

[11] *Cf. First Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (holding that state courts must provide a damage remedy for temporary takings of property which deny all use to the owner, and in so doing rejecting the argument that "the prohibitory nature of the Fifth Amendment . . . combined with principles of sovereign immunity" preclude requiring state courts to afford such relief against States).

require a refund, federal due process does—due process, that is, as interpreted by *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), and the long line of cases upon which *McKesson* depends. See *id.*, at 32-36, citing *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931); *Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of Comm'rs of Love Cty.*, 253 U.S. 17 (1920); *Atchison, T. & S. F. R. Co. v. O'Connor*, *supra*; see generally Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733, 1824-1830 (1991). As we said, these cases stand for the proposition that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment," *Carpenter*, *supra*, at 369, the sovereign immunity States traditionally enjoy in their own courts notwithstanding. (We should note that the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum. See *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459 (1945).) [513 U.S. at 109-10.]

As the Court had explained in *Ward v. Love County*, relied on in *Reich v. Collins*, this obligation to return money unlawfully taken cannot be impaired by any state law defenses:

> As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. . . . To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the four-

> teenth Amendment, which binds the county as an agency of the State. [253 U.S. at 24.]

And, *General Oil v. Crain*, in rejecting the state sovereign immunity claim made there, laid the foundation for the later cases by recognizing the critical role of state court actions against the State in the vindication of federal rights where the Eleventh Amendment precludes a federal court action. In this regard *General Oil* emphasized that:

> Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. . . . If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation. [209 U.S. at 226.]

To be sure, the line of cases culminating in *Reich v. Collins* does not deal directly with the effect of state sovereign immunity rules across the full range of federal causes of action against the State in which the plaintiffs seek financial redress for losses occasioned by state action "in violation of the laws or Constitution of the United States." But it is difficult, if not impossible, to cabin the *Reich v. Collins* due process principle to the unlawful state tax exactions at issue in that case and its predecessors.

State action taking a person's money or other property in violation of governing federal constraints and denying that person all state court redress for that loss is, most assuredly, a plain affront to due process and to the underlying due process values of fairness and justice in

the administration of the legal regime. But such state action is *not* qualitatively different from state action unlawfully withholding money or other property due to a person under the governing federal law, and then denying that person all state court redress for that loss. Unlawfully taking property that a person rightfully has in hand and unlawfully withholding property from a person who has a legal right to it may not be identical legal wrongs, but the two could not be more closely allied. And, in both instances where a State violates federal law and its courts then deny the federal right-holder redress on state law grounds, the actions of the State both frustrate the enforcement of the paramount federal law and do so in a manner that denies the federal right holder the most basic element of the legal process that is his due.

Thus, *Reich v. Collins* suggests that the Maine courts' refusal to hear and decide federal law causes of action against the State, like the FLSA cause of action here, raises serious Fourteenth Amendment concerns. And that, of course, provides added support for our principal position that by reason of the Supremacy Clause the Maine courts had an obligation to hear and decide the FLSA cause of action brought here and to do so according to the applicable federal law.

II. A State Court May Not Refuse To Entertain A Federal Statutory Private Party Cause Of Action Against A State On The Basis Of State Sovereign Immunity Where The State Court Entertains Analogous State Statutory Causes Of Action Against The State.

In part I of our argument we considered the Article I/ state sovereign immunity issue presented by this case without plumbing the significance of the fact that the Maine courts are open to state-law private party causes of action against the State analogous to the federal law FLSA private party cause of action brought here. Since Maine law does provide for analogous causes of action against the State, none of which is barred by state sovereign

immunity and all of which are routinely heard and decided by the Maine courts, the non-discrimination principle crystallized in *Testa v. Katt*, 330 U.S. 386 (1947), in its own terms requires the Maine courts to hear and decide this FLSA cause of action.

In Justice O'Connor's succinct formulation, "it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action. See *Testa v. Katt*, 330 U.S. 386 (1947)." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring in part and dissenting in part). And *Howlett v. Rose* provides the underlying base for this rule by tracing the Court's path from *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912), to *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230 (1934), to *Testa v. Katt* itself. As to *Mondou* and *McKnett*, the Court noted:

> In *Mondou*, for example, we held that rights under the Federal Employers' Liability Act (FELA) "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." 223 U.S., at 59. . . . [We] found from the fact that the state court was a court of general jurisdiction with cognizance over wrongful-death actions that the court's jurisdiction was "appropriate to the occasion," *id.*, at 57. "The existence of the jurisdiction creat[ed] an implication of duty to exercise it," *id.*, at 58, which could not be overcome by disagreement with the policy of the federal Act, *id.*, at 57.
>
> In *McKnett*, the state court refused to exercise jurisdiction over a FELA cause of action against a foreign corporation for an injury suffered in another State. . . . Because the state court had "general jurisdiction of the class of actions to which that here brought belongs, in cases between litigants situated like those in the case at bar," *id.*, [292 U.S.], at 232, the refusal to hear the FELA action constituted dis-

> crimination against rights arising under federal laws, *Id.*, at 234, in violation of the Supremacy Clause. [*Howlett*, 496 U.S. at 373.]

Howlett then states that the foregoing "principles" were "unanimously reaffirmed" in *Testa v. Katt*, where the Court

> held that the Rhode Island courts could not decline jurisdiction over treble damages claims under the federal Emergency Price Control Act when their jurisdiction was otherwise "adequate and appropriate under established local law." 330 U.S. at 394. . . . We observed that the Rhode Island court enforced the "same type of claim" arising under state law and claims for double damages under federal law. 330 U.S. at 394. We therefore concluded that the court had "jurisdiction adequate and appropriate under established local law to adjudicate this action." *Ibid.* The court could not decline to exercise this jurisdiction to enforce federal law by labeling it "penal." The policy of the federal Act was to be considered "the prevailing policy in every state" which the state court could not refuse to enforce " 'because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.' " *Id.*, at 393 (quoting *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S., at 222). [*Howlett*, 496 U.S. at 373-74.]

There can be no doubt that the Maine Superior Court had " 'general jurisdiction of the class of actions to which that here belongs in cases between litigants situated like those in the case at bar' . . . and that the refusal to hear the [federal law] action [here] constituted discrimination against rights arising under federal laws . . . in violation of the Supremacy Clause."

The Maine Superior Courts, such as the Superior Court for Cumberland County where this action was brought, are courts of general jurisdiction. 4 M.R.S. § 105. As such, those courts have broad jurisdiction over a wide

range of state law actions brought by private parties—both state employees and others—against the State seeking monetary remedies. And, as the Maine courts have recognized, there is no Maine common law or Maine constitutional law state sovereign immunity bar to those state law causes of action. *Davis v. City of Bath*, 364 A.2d 1269 (1976).

Under the Maine Tort Claims Act, 14 M.R.S. § 8101 *et seq.*, for example, the Superior Courts have jurisdiction to hear and decide claims against the State for "property damage, bodily injury or death," 14 M.R.S. § 8104-A (defining claims within Act); § 8106 (setting forth jurisdiction of Superior Courts). The Superior Courts have jurisdiction to hear and decide claims against the State for "taking of . . . property in the constitutional sense," *Foss v. Maine Turnpike Auth.*, 309 A.2d 339, 344 (1973), and the related class of claims against the State for "legally unauthorized physical invasion of property or of serious impairment of property use and enjoyment," *id.* at 342. In condemnation actions involving the State Department of Transportation, the Superior Courts have jurisdiction to hear, and do hear, appeals by parties aggrieved by an award by the State Claims Commission. 23 M.R.S. § 157 ("This appeal is de novo and is taken by filing a complaint setting forth substantially the facts upon which the case will be tried like other civil cases.").

Of the most particularized significance, the Maine Superior Courts have jurisdiction to hear, and do hear, a wide variety of state employee state law wage actions against the State. These include:

- actions for late payment of wages; 26 M.R.S. § 621(2), see also, 26 M.R.S. § 626-A (providing for award of triple damages and attorneys fees to prevailing employee-plaintiff);
- actions for failure to pay the Maine statutory minimum wage, 26 M.R.S. §§ 664, 670 (providing for

award of double damages and attorneys fees to prevailing employee-plaintiff);

- actions for violations of the Maine Whistle Blower law, 26 M.R.S. §§ 833, 834-A (providing for recovery of monetary penalties); actions for violations of the Maine Family Medical Leave Act, 26 M.R.S. § 844, and § 848 (providing for liquidated damages of up to $100.00 per day);
- actions for violations of the Maine Human Rights Act, 5 M.R.S. §§ 4551, 4613, 4614 (providing for back wages, penalties and attorneys fees); and
- actions for violations of the Maine Workers Compensation Act anti-retaliation protections, 39-A M.R.S. §§ 307, 353.[12]

By closing the Maine courts to the federal law employee wage actions brought here, the Maine Supreme Judicial Court's decision dishonors the anti-federal-claim-discrimination principle descending from *Mondou* and restated in *Howlett*. The foregoing summary of the Maine law makes it plain that the Maine courts do hear and decide state law private party actions for monetary remedies which are "analogous" to (*F.E.R.C.*, 456 U.S. at 776 n.1), or of the "same type" as (*Testa*, 330 U.S. at 394), the federal law FLSA claims brought here.

The Maine courts in particular hear and decide state employee wage claims brought under a panoply of employee protective legislation, which like the FLSA, provide for back wages, and sometimes for liquidated damages and attorneys fees. Whether characterized in terms of the damages sought—wages, liquidated damages, attorneys fees—or the identity of the parties—state employees and the State—the Maine courts hear and decide private party state law causes of actions for monetary remedies that are in the same "class of actions" as the FLSA actions the Maine courts refuse to hear and decide. And these state law causes of action routinely heard in the Superior Courts, are "analogous" to the FLSA action here on the strictest interpretation of the "analogy" test of *Howlett*, *F.E.R.C.* and *Testa*.

[12] This listing is not exhaustive. Under the Maine Workers Compensation Act, for example, state employees may sue the state if the State fails to make timely payment of compensation. The Superior Courts also entertain actions against the State brought by employees under the Maine Unemployment Compensation Act, 26 M.R.S. §§ 1043(11)(A-1), 1194(8), and the Maine State Employee Labor Relations Act, 26 M.R.S. §§ 979-A, 979-M.

CONCLUSION

For the foregoing reasons the decision and judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted,

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